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No. 08-1027

In the Supreme Court of the United States

ALLIANCE FOR COMMUNITY MEDIA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA;
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* CITY OF MADISON, WISCONSIN, CITY OF SEATTLE, WASHINGTON, CITY OF VANCOUVER, WASHINGTON, CLARK COUNTY, WASHINGTON, NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS, AND LOUISIANA MUNICIPAL ASSOCIATION IN SUPPORT OF PETITIONERS

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RULE 29.6 STATEMENT

No parent or publicly held company owns 10% or more of the any of the amici as they are local governments or representative entities.

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INTEREST OF AMICI[1]

Since the advent of cable services, local governments have acted as franchising authorities to ensure that their respective citizens receive the benefits of competitive service while also protecting public property from inappropriate uses. By regulating cable franchises local governments have acted in their traditional role of overseeing public property and working to the benefit of their citizens. The *amici* are local governments who are affected by the FCC's Order.

STATEMENT[2]

This case rests on the meaning of the word "unreasonably" as found in the phrase "a franchising authority . . . may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. 541(a)(1). The Sixth Circuit determined that the word "unreasonably" is ambiguous and upheld the FCC's regulation interpreting the phrase "unreasonably refuse to award" without considering and applying the ordinary meaning of the word "unreasonably" to the statute before it, without considering the presumption against preemption, and without considering that a

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[1] Counsel of record for all parties received notice 10 days prior to the due date of *amici curiae*'s intention to file this brief and consented to its filing. Counsel for *amici curiae* authored this brief in its entirety and no party or their counsel, nor any other person or entity other than *amici curiae* or its counsel, made a monetary contribution to this brief.

[2] The amici adopt the Statement of the Case presented in the Petition.

clear statement delegating preemptive authority is required before an agency may preempt state and local government sovereignty. Pet. App. at 28a-30a. Had the Sixth Circuit undertaken the evaluation required by this Court's precedents, it could not, and would not, have upheld the FCC's Order.

The importance of this case in terms of federalism cannot be overstated. At issue is the ability of a federal agency to preempt the authority of locally elected and appointed officials to regulate the use of local property for the benefit of their citizens, all under the guise of interpreting a federal statue.

SUMMARY OF THE ARGUMENT

The *amici* respectfully urge this Court to accept certiorari in this case for three independent but interrelated reasons. First, the general issue presented is one of recurring importance to the structure of our federal system of government. The question of federal preemption of state and local law is frequently before this Court. In addition, the particular question of an agency's ability to preempt state and local law through rulemaking has been and is currently before the Court. As such, this case presents substantially related questions to those raised in *Cuomo v. The Clearing House Association, L.L.C.*, 510 F.3d 105 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3412, (Jan. 16, 2009) (No. 08-453), in which the Court will hear argument on April 28, 2009.

Second, in addition to the important and open question presented above, the Sixth Circuit's opinion directly conflicts with several of this Court's precedents with respect to delegation of authority to

agencies and preemption analysis and statutory construction. The Sixth Circuit fundamentally erred when it concluded that the FCC possessed authority to interpret the provisions of 47 U.S.C. § 541. This error was two-fold. First, the Sixth Circuit erroneously determined that the FCC's general rulemaking authority provided it the authority to engage in rulemaking which results in preemption. Second, the court of appeals erroneously determined that Congress's judicial enforcement mechanism did not restrict the FCC's authority.

Lastly, the Sixth Circuit's opinion conflicts with this Court's statutory construction precedents. This Court has repeatedly held that statutory interpretation must begin with the text of the statute and that words which are not defined in a statute are to be attributed their ordinary meaning. The Sixth Circuit completely failed to examine the ordinary meaning of the word "unreasonably," and engaged in no textual analysis whatsoever. Instead, the court of appeals relied on a handful of other cases which summarily concluded "unreasonably" is ambiguous. Pet. App. at 28a-30a.

The importance of the issues and the conflict with this Court's precedents make this case worthy of review.

I. THIS CASE PRESENTS IMPORTANT QUESTIONS REGARDING THE PREEMPTIVE EFFECT OF AGENCY RULEMAKING

The *amici* urge this Court to accept certiorari to address the important and recurring question of

federal agency authority to engage in interpretive rulemaking which has the effect of preempting state and local laws. This Court has yet to resolve many issues relating to regulatory preemption.

Between its decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and the end of its 2005 Term, this Court decided 131 cases in which preemption of state law was at issue and a federal agency rule, order, or interpretation was relevant to the Court's decision. *See* William N. Eskridge, Jr., *Legislative Vetogates, Preemption, and Chevron Deference*, 83 NOTRE DAME L. REV. 1441, 1442 (2008). The frequency with which this Court addresses agency activity in the context of statutory interpretation and application shows the importance of the issues in this case and demonstrates that this case is worthy of a grant of certiorari.

When this Court accepted *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), constitutional observers anticipated that the Court would address some of the recurring issues of the interplay between agency activity and preemption, but the Court ultimately declined to consider "the dangers of vesting preemptive authority in administrative agencies" because it concluded that the underlying statute itself preempted state law. *Id.* 1572 n. 13. However, the dissenters in *Watters* expressly rejected *Chevron* deference in such situation, noting that it would too "easily disrupt the federal-state balance," that agencies are not well designed to represent the interests of States, and that agencies are unlikely to show sufficient respect for state sovereignty. *Id.* at 1584.

As noted above, currently before the Court is *Cuomo v. The Clearing House Association, L.L.C.*, 510 F.3d 105 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 3412, (Jan. 16, 2009) (No. 08-453). That case asks whether a federal regulation preempting the enforcement of state law, but not the underlying state law, is entitled to judicial deference under *Chevron*. The *Cuomo* case is being closely watched by constitutional scholars.

The case at bar raises issues similar to those raised in *Watters* and *Cuomo*, to wit, the extent of a federal agency's authority to interpret allegedly ambiguous statutory language such that state and local laws and authority are preempted.[3] The case at bar presents additional issues worthy of this Court's review, including the extent to which a judicial enforcement scheme precludes deference to agency opinion and the extent to which a court should engage in its own independent textual review of statutory language even before reaching the question of deference to agency opinion. As such, the case is of exceptional importance and warrants this Court's attention.

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[3] "Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari ha been granted, the issue is obviously important. . . ." Robert L. Stern, *et al.*, SUPREME COURT PRACTICE 255 (8th Ed. 2002).

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS HOLDING THAT THE AUTHORITY TO PREEMPT MUST BE DELEGATED BY CONGRESS.

The Sixth Circuit upheld the FCC's Order under *Chevron* after determining that the FCC had been delegated the authority to interpret 47 U.S.C. 541(a). Pet. App. at 19a. The Sixth Circuit's conclusion in this regard is in conflict with this Court's precedents.

Judicial deference, pursuant to *Chevron*, to certain agency interpretations of law can only be justified if there has been a congressional delegation of lawmaking power. Before accepting an agency's interpretation, a court must assure itself that an agency is acting pursuant to delegated lawmaking authority. *See Chevron*, 467 U.S. 837, 842–45 (1984).

Further, when agency rulemaking purports to preempt state and local law, a court should require a *clear statement of delegation* from Congress before deferring to agency rulemaking under *Chevron*. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") This Court has held that delegation of general rulemaking authority and general statements regarding an agency's ability to administer a statute will not suffice as a clear statement.

For example, in *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. 638 (1990) this Court declined to

apply *Chevron* when it reviewed a Department of Labor determination of the preemptive effect of the Migrant and Seasonal Agricultural Worker Protection Act. While finding that there was no statutory gap to fill in the first instance, this Court stated that even if there was an ambiguity to fill, it would not defer to the agency under a grant of general rulemaking authority. This Court held that "a delegation of authority to promulgate motor vehicle 'standards'" did not include the authority to decide the preemptive scope of the federal statute. *Adams Fruit*, 494 U.S. at 649-50. As such, *Chevron* deference was not appropriate.

Just two weeks ago in *Wyeth v. Levine*, No. 06-1449, 2009 WL 529172, *11 (U.S. March 4, 2009) this Court refused to give *Chevron* deference to the Food and Drug Administration position, finding that "Congress has not authorized the FDA to preempt state law *directly*," and therefore refused to accept the FDA's preemption interpretation. In reaching its conclusion, this Court cited several code sections that qualified as a congressional grant of preemption authority to an agency. Specifically, the Court cited the following code section:

- 47 U.S.C. §§ 253 (a), (d) (2000 ed.), which authorizes the Federal Communications Commission to preempt "any [state] statute, regulation, or legal requirement" that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service";

- 30 U.S.C. § 1254(g) (2006 ed.) which preempts any statute that conflicts with "the purposes and the requirements of this chapter" *and* permits the

Secretary of the Interior to "set forth any State law or regulation which is preempted and superseded"); and

• 49 U.S.C. § 5125(d) (2000 ed. and Supp. V), which authorizes the Secretary of Transportation to decide whether a state or local statute that conflicts with the regulation of hazardous waste transportation is pre-empted.

In *Wyeth*, the Court noted that "if Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point." *Id.* at 10. The Court also held that Congress's silence on the issue of preemption in the federal Food Drug and Cosmetic Act (FDCA), coupled with its "certain awareness" of the prevalence of state tort litigation, served as powerful evidence that Congress intended state law to have a role in the regulation of drug safety. *Id.* at 10.

Like the FDCA, neither 47 U.S.C. § 541 nor any other portion of the Communications Act pertaining to cable services contains a direct congressional grant of preemptive authority to the FCC. In fact, the opposite is true. Not only has the FCC not been granted the authority to preempt state law directly, but as the text of § 541 makes clear, Congress specifically preserved local franchising authorities' powers with respect to granting franchises, provided that they do not act "unreasonably." As the unanimous Court stated in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-167, (1989), "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever

tension there [is] between them." In light of *Bonito Boats*, and considering Congress's protection of local franchising authority in § 541, it is clear that the Sixth Circuit erred when it upheld the FCC's order interpreting § 541.

Further, even absent the foregoing, the case at bar is not the ordinary *Chevron* deference case, where neutral agency expertise is allowed to fill the gaps in a complex regulatory statute. The FCC's interpretation of § 541 does not merely fill an alleged gap in the Cable Act; it instead makes a major legal and policy determination that intrudes on the role of the States and local governments in our federal system. In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), this Court stated that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160. These same considerations show that Congress did not intend for the FCC to have authority to define "unreasonably" in the context of 47 U.S.C. § 541 through a grant of general rulemaking authority.

The Sixth Circuit's opinion is in conflict with *Gregory, Adams Fruit, Wyeth, Bonito Boats,* and *Brown & Williamson*. The Sixth Circuit allowed the FCC to preempt state and local laws through the application of a general grant of rulemaking authority, while close to 30 years of this Court's teachings require an explicit grant of preemptive authority. For this reason, the *amici* respectfully request that this Court grant the petition for certiorari.

III. THE JUDICIAL ENFORCEMENT MECHANISM PRECLUDES THE FCC'S ASSERTION OF AUTHORITY TO INTERPRET 47 U.S.C. § 541

The Sixth Circuit erred when it held that the provision of court review as a means of vindicating rights under § 541 did not preclude the FCC's ability to interpret § 541. Pet. App. at 30a. This holding directly conflicts with this Court's holding in *Adams Fruit*. In *Adams Fruit*, this Court unanimously held that even if the federal statute's language regarding a private right of action was ambiguous, the Court would "not defer to the Secretary of Labor's view of the scope of § 1854 because Congress has *expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute.*" *Adams Fruit*, 494 U.S. at 649-650.

The Court found that "Congress established an enforcement scheme independent of the Executive and provided aggrieved farm workers with direct recourse to federal court where their rights under the statute are violated." *Id.* at 650. This Court found that while Congress clearly envisioned and in fact mandated, a role for the Department of Labor in administering the statute at issue, this delegation did not empower the Secretary to regulate the scope of the judicial power vested by the statute. *Id.* at 650.

Similarly, in this case, the FCC attempted to regulate the scope of the judicial enforcement scheme laid out in 47 U.S.C. §§ 541 and 555. By providing its own definition of the term "unreasonably" based upon what it believes to be sound national policy, the FCC has supplanted the role of the judiciary. The FCC's

Order prevents the judiciary from fulfilling its congressionally envisioned role of determining what is reasonable in a given set of circumstances and therefore conflicts with the Court's precedents. As such, certiorari should be granted.

IV. THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S STATUTORY CONSTRUCTION PRECEDENTS

This Court's statutory construction precedents establish the method by which courts should review statutory language to determine whether a statute is ambiguous. When examining an agency's rule interpreting a statute, courts must ask first whether "the intent of Congress is clear" as to "the precise question at issue." *Chevron*, 467 U.S. at 842.

If, by "employing traditional tools of statutory construction," *id.*, at 843, n. 9, Congress's intent is clear, "that is the end of the matter," *id.*, at 842. "Statutory construction must begin with the language employed by Congress and the assumption that the *ordinary* meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U. S. 246, 252 (2004). (Internal quotation marks omitted)(Emphasis added). *See also*, *Lamie v. United States Trustee*, 540 U. S. 526, 534 (2004); *Crawford v. Metropolitan Government of Nashville and Davidson Cty.*, 129 S.Ct. 846, 850 (2009)) (*citing Perrin v. United States*, 444 U. S. 37, 42 (1979); *Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). Further, it is well established that, when the statutory language is plain, it must be enforced according to its terms. *See, e.g., Jimenez v.*

Quarterman, 129 S.Ct. 681, 685 (2009); *Dodd v. United States*, 545 U. S. 353, 359 (2005); *Lamie, supra, at 534; Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U. S. 1, 6 (2000); *Caminetti v. United States*, 242 U. S. 470, 485 (1917).

The crux of this matter then is whether "unreasonably" is ambiguous. It is not. Ambiguity arises when the meaning of a word or phrase is not known. Nothing in the statutory text or in ordinary usage suggests that the word "unreasonably" is ambiguous. "Unreasonably" is the adverb form of "unreasonable," which is defined as irrational, capricious, arbitrary or exorbitant. See BARRON'S LEGAL DICTIONARY 512 (3d Ed. 1991), WEBSTER'S NEW WORLD DICTIONARY 646 (1990) and BLACK'S LAW DICTIONARY 1538 (6th Ed. 1991). No set of facts changes the *meaning* of the word "unreasonably." While context may determine whether a given set of facts is "unreasonable," the meaning of the word itself does not change. The Sixth Circuit erred when it held that because evaluation of the facts is necessary to determine whether a franchise requirement is reasonable, the word "unreasonably" is necessarily ambiguous. The *amici* request this Court grant certiorari in this case to correct the Sixth Circuit's misapplication of its precedents.

CONCLUSION

As Justice Thomas recently noted in *Wyeth*, this Court has long recognized the Constitution's intent to preserve the authority of States, thereby "assur[ing] a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; increas[ing] opportunity for citizen involvement in

democratic processes; [and] allow[ing] for more innovation and experimentation in government." *Wyeth*, 2009 WL 529172, at *14, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The Constitution "contemplates that a State's government will represent and remain accountable to its own citizens." *Printz v. U.S.*, 521 U.S. 898, 920 (1997). When the lines between state and federal responsibility are confused, as they are under the FCC's Order, "one of the Constitution's structural protections of liberty" is jeopardized. *Id.* at 921.

The FCC's actions in this case are antithetical to the protections established by the Constitution. The *amici* respectfully request that this Court grant the Petition for Certiorari.

Respectfully Submitted,

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